Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

JOHNNY M. EVANS, SR.
Petitioner

versus

DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD and THE CITY OF DERIDDER, LOUISIANA
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

APPENDIX - VOLUME I

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JOHNNY M. EVANS	:	36TH JUDICIAL DISTRICT COURT
VS. C-97-1106-A	:	PARISH OF BEAUREGARD
DERIDDER MUNICIPAL FIRE, ET AL	:	STATE OF LOUISIANA
FILED: _____	:	_____ DEPUTY CLERK OF COURT

MEMORANDUM IN SUPPORT OF PLAINTIFF'S APPEAL

NOW INTO COURT, comes Plaintiff, JOHNNY M. EVANS, through undersigned counsel, who respectfully submits the following in support of this appeal:

FACTS:

The Plaintiff, JOHNNY M. EVANS, SR., was terminated from his employment with the DeRidder City Police Department by letter dated October 29, 1997. The termination became effective October 31, 1997 at 4:00 o'clock p.m. Reasons for his termination were set forth in a letter from Chief of Police, Arvin Malone, dated October 29, 1997 which stated, in pertinent part:

"1. Patrolman Evans is a friend of Pickens:

A. There is no logical reason Eric would makeup such a story on a friend.

2. Eric made accusations before he was a suspect and again after becoming a suspect.

3. It is apparent Eric and Johnny Evans, Jr., knew or Earnest Prater's connection with Law Enforcement as this is the motive established by the Vernon Parish Sheriff's Department for the homicide.

A. May times different people are thought to be Confidential Informants For Law Enforcement, sometimes true, but many times not so. Based on "Street Talk", there has been no such retaliation against people Accused of being Confidential Informants as the suspects are accused of doing. This would indicated that they most likely had a strong confirmation from someone in position to know for Certain what Prater's connection was with Law Enforcement, Officer Evans knew of this connection. Granted other Law Enforcement Personnel knew of the connection, but none of them have been accused of leaking the information to the suspects, Officer Evans has been.

Possible Motivation for Ptn. Vans to disclose the identity of Prater:

1. To protect his son from possible arrest.
   A. Knew son was suspected of possible drug activities.

2. To protect Eric Pickens from possible arrest.
   A. Eric is a friend.

Possible Reasons for Ptn. Evans to deny accusation:

1. Accusation may not be true.
2. To protect himself rom possible criminal charges.
3. To protect himself from possible civil liability.
4. To protect himself from possible administrative sanctions.
5. To maintain his credibility and trust of the public, fellow officers, other law enforcement agencies, and Criminal Justice Entities; Judges, District Attorney, etc.

Test results of the polygraph examination - "The results of the test indicated that Officer Evans wasn't being truthful when he denied disclosing the identity of Earnest Prater to Eric Pickens and johnny Evans, Jr."

On November 3, 1997, the undersigned counsel filed a request for a hearing before the DeRidder Municipal Fire and Police Civil Service Board (hereinafter referred to as the "Board") on the employment termination of Officer Johnny M. Evans, Sr. A hearing was scheduled for December 18, 1997.

On December 18, 1997, a hearing was held to determine if the termination of Officer Johnny M. Evans, Sr., was taken in

good faith for cause.

The Board found that the evidence was conclusive and affirmed the termination of Officer Johnny M. Evans, Sr.

The Board relied solely on the results of the polygraph examination of Plaintiff, Johnny M. Evans, Sr., and did not take into consideration any conflicting evidence which was presented at the hearing by the undersigned counsel. Little, if any, evidence was adduced or exists substantiating the assumptions, innuendos and unjustified conclusions asserted in the letter of termination from chief Arvin Malone, none of which would be sufficient, even if proven, to support the decision of the Board. Ultimately, the Board, through their counsel, David Lestage, stated that they relied solely on the results of the polygraph test (see page 105 of the transcript of the hearing held on December 18, 1998, wherein it is stated that):

"By Mr. Lestage:

> "we'll concede that. I mean, that has nothing to do with the matter at hand. This line of questioning is irrelevant. If the Commission will turn to the top of page

three of the discharge letter, it says, "Because of the seriousness and nature of the accusation, officer Evans

was ordered to submit to a polygraph examination in order to boost the credibility of the accused and/or accuser." **That's what we're here about**. We're not here about Eric Pickens and whether he told the right version the first time, the second time, the third time, or whether he can reconcile all three versions. He might be able to reconcile why all three are true. But that's not for us, and it not - - certainly for Chief Malone to decide now, nor to have decided on October 29.
And we'd object to this ~~line~~ of ~~questioning~~."

By Mr. Jones:

"Mr. Chairman, again his argument is inconsistent with the letter. The letter of termination says: **We're relying on the credibility of Pickens.** His argument flies in the face of that, and they're trying to squirm away from it as hard as they can; because he's a liar, and we've caught him lying every time he's turned around in these statements. And this termination letter says: **We are relying on the credibility of Pickens and the polygraph**. But now, since its very inconvenient to rely on the credibility of Pickens because he's lying everywhere, they want to just rely on the polygraph. And I ask you not to let them do that. I ask you to let me explore the inconsistencies so I can get them on the record".

Chairman Williams:

We're kind of wandering way off too far.

Mr. Jones:

I only have one other question in this line, and I'll move on after that, Mr.Chairman.

Q. (Mr. Jones) Are you aware that, in his statement to Detectives Hagan and Smith, Eric Pickens indicates on page ten that he does not Know J.J. Johnson?

Mr. Lestage:

Again, Mr. Chairman, I'M going to have to object. Whether any of us know J.J. Johnson is beside the point. It's just not relevant.

Chairman Williams:

Sustained

Mr. Jones:

I can't get into this other lie to show this last inconsistency, Mr. Chairman?

Chairman Williams:

No, sir.

Mr. Jones:

Well, I'd ask to proffer it in, then. And I need to ask Chief Malone a question in order to complete my proffer.

Chairman Williams:

Okay.

Q. (Mr. Jones) Chief Malone, were you aware that on August 16, 1997, Eric Pickens did an undercover buy from J.J. Johnson of drugs?

A. I was aware there was some involvement there. I don't know all of the details on it, but I was aware that there was some transaction there somehow.

Mr. Jones:

That completes my proffer on that question, Mr. Chairman."

Claimant contends that his termination was without **good faith and cause** and it is from the Board's decision that he appeals.

That on December 29, 1997, the undersigned counsel filed a Notice of Appeal with the Secretary of the Board. The Appeal, together with a transcript of the hearing and all exhibits have been forwarded to this Honorable Court for a determination of this matter in a summary manner.

LAW

This case comes before this Honorable Court under R.S. 33:2561 wherein it is stated that, in pertinent part:

["the] Court shall proceed to hear and determine the appeal in a summary manner. This hearing shall be confined to the determination of whether the decision made by the Board was made in **good faith for cause**

under the provisions of this Part."

Additionally, and only in the event that it is found that the decision of the Civil Service Board was made in good faith and for legal cause, there must be **sufficient evidence** to support the administrative decision. City of Abbeville v. Abbeville Fire and Police, 599 So. 2d 508 (La. App. 3 Cir. 1992) writ denied 604 So. 2d 1308.

It is respectfully submitted that sufficient evidence is synonymous with "competent" evidence. The decision of the Civil Service Board of the City of DeRidder must be based on competent evidence. Incompetent evidence will not be considered on appeal. Ruddock v. Jefferson Parish Fire Civil Service Board, 688 So. 2d 112 (La. App. 5th Cir.).

Further, the issue to be determined by the Board or by the District Court, in the event an appeal is taken to that Court, is whether the decision of the appointing authority or of the Board was "made in good faith for cause" is construed to mean that the

action of the appointing authority, in order to be valid must be **both** "in good faith" and "for cause". The action of the authority must be set aside if it was not taken "for cause" even though it may have been taken in good faith. Martin v. City of St. Martinville, 321 So. 2d 532 (La. App. 3 Cir. 1975) writ denied 325 So. 2d 273.

The burden of proof of the appointing authority in a proceeding challenging termination of a civil service employee is by preponderance of the evidence. The facts must be clearly established, they need not be established beyond a reasonable doubt as in a criminal case. Ruddock v. Jefferson Parish Fire Civil Service Board., 688 So. 2d 112 (La. App. 5 Cir.)

In the recent case United States v. Edward G. Scheffer, 118 S. Ct. 1261 (U.S. S.Ct. 1998) , the United States Supreme Court held "**There is simply no consensus that polygraph evidence is reliable**." Consistent with the Scheffer case, Louisiana Courts have excluded such evidence in both civil and criminal cases.

In State vs. Catanese, 368 So. 2d 975 (La. 1979) , the Court ruled that:

> ". . . after considering the evidence in the instant case and studying the authorities and extensive literature in the field, we conclude that it shall be the **judicial policy of Louisiana** to exclude polygraph evidence in criminal trials at this time."

The Court further stated in Catanese that:

> ". . . Our fundamental concern is that the trier of fact is apt to give almost conclusive weight to the polygraph expert's opinion.
>
> * * *. . . extensive procedural safeguards should be established either by court rule or legislation before the introduction of polygraph tests at trial.
>
> * * *. . . In our judgment there has not yet been enough judicial experience with polygraph evidence in Louisiana to provide an adequate basis for judicial rule making on this scale".

After a full reconsideration of the problem of lie detector evidence, the Court in State v. Hocum, 456 So. 2d 602 (La. 1984) declared it to be the judicial policy of Louisiana to exclude for any purpose polygraph evidence in criminal trials. The principal reasons for such exclusion were stated to be (1) the

propensity of triers of fact to give conclusive weight to the polygraph expert's opinion; (2) The lack of a regulatory program for maintaining an adequate level of examiners' ability, experience, education, integrity and availability and (3) The need for procedural rules and safeguards governing the introduction of polygraph evidence. State v. Catanese, supra at 981. See also State v. Whitmore, 353 So. 2d 1286 (La. 1978); State v. Davis, 351 So. 2d 771 (La. 1977); State vs. Schouest, 351 So. 2d 462 (La. 1977); State v. Weeks, 345 So.2d 26 (La. 1977); State v. Governor, 331 So. 2d 443 (La. 1976); State v. Corbin, 285 So. 2d 234 (La. 1973); State v. Refuge, 270 So. 2d 842 (La. 1972). ". . . Subsequently, this court made it clear that the Catanese rule excluding polygraph evidence for any purpose from criminal trials also operates to prevent any reference during trial tot he fact that a witness has taken a polygraph examination with respect to the subject matter of his testimony. State vs. Tonubbee, 420 So. 2d 126 (La. 1982); State v. Davis, 407 so. 2d 702 (La. 1981).

In Edmon O. Hines vs. Arkansas Louisiana Gas Company, et al, 613 So. 2d 642 (La. App. 2nd Cir. 1993) the court agreed that ". . . results of a polygraph examination would be inadmissable", the court ruled that plaintiff could present testimony concerning his offer to take the test . Furthermore, the exclusion of such evidence in civil cases has been consistently upheld on appeal. Rebouche v. Anderson, 505 So. 2d 808 Ola. App. 2nd Cir. 1987), writ denied 507 So. 2d 228 (La. 1987); Associates Financial Corporation v. Carrick 441 So. 2d 1311 (La. App. 2nd Cir. 1983). Indeed, the federal fifth circuit has noted adherence to an unequivocal rule of exclusion, making no exception for civil cases, even in instances where the polygraph results are purportedly offered for a purpose other than asserting the truth of the statements contained therein. See Barrel of Fun, Inc. v. State Farm Fire & Casualty, 739 F.2d 1028, 1031 (5th Cir. 1984); Smith v. Gonzales, 670 F. 2d 522, 528 (5th Cir. 1982), cert. denied, 459 U.S. 1005, 103 S.Ct. 361, 74 L.Ed. 2d 397 (1982). ". . . the foremost reason for disallowing such

evidence rest with its exaggerated, prejudicial effect upon the triers of fact". Accord, E. Clearly, McCormick's Handbook on the Law of Evidence, 207 at 507 (2d E. 1972). [P]resent-day jurors, despite their sophistication and increased education levels and intellectual capabilities, are still likely to give significant, if not conclusive, weight to such evidence. U.S. v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975). In the case before this Court on appeal, the Civil Service Commission for the City of DeRidder relied strictly on the polygraph evidence and affirmed the termination of Officer Johnny M. Evans accordingly.

In John G. Manale vs. Department of Police, 376 so. 2d 607 (La. App. 4th Cir. 1979), the New Orleans Civil Service Commission used the rule from a criminal case (no polygraph evidence is admissible) and applied it to its' administrative case. The 4th Circuit upheld this application. In Manale, the Court relied on the authority of State v. Corbin, 285 So. 2d 234 (La. 1973) and found that the polygraph test was inadmissable and concluded that the City's case had to stand or fall without the

results of the test.

In Glenn A. Arnold v. New Orleans Police Department, 383 So. 2d 810 (La. App. 4th Cir. 1980) writ denied June 6, 1980, a Civil Service Commission case similar to the instant case wherein an Officer was terminated from his employment, it was the Court's ruling that the Civil Service Board did not err in refusing to accept results of polygraph test. ". . . Excluding the results of the polygraph tests, the question remains whether the evidence in the record supports the appointing authority' sanction by a preponderance of the evidence".

Notwithstanding the propriety of the polygraph, the test results alone or the test results coupled with the suggestions and

assertions of the Chief Arvin Malone's termination letter are insufficient to support the Commissions actions.

BY ATTORNEY:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Memorandum in Support of Plaintiff's Appeal has this day been forwarded to David R. Lestage, Attorney for the Defendants.

DeRidder, Louisiana, this 2nd day of October, 1998.

CHARLES A."SAM" JONES, III

JOHNNY M. EVANS, SR.	:	36TH JUDICIAL DISTRICT COURT
VS. C-97-1106-A	:	PARISH OF BEAUREGARD
DERIDDER MUNICIPAL FIRE, ET AL	:	STATE OF LOUISIANA
FILED: _____	:	_____ DEPUTY CLERK OF COURT

RESPONSE TO MEMORANDUM OF CITY OF DERIDDER

NOW INTO COURT, comes Plaintiff, JOHNNY M. EVANS, through undersigned counsel, who in rebuttal and/or opposition to the Memorandum filed by the City of DeRidder, submits:

Counsel for the City suggests that Due Process requirements have been met and fulfilled based on the amount of time Patrolman Evans was represented by counsel and the number of communications made thereafter.

Johnny Evans, Sr., was not afforded due process of law in

the Civil Service Proceeding. A review of the transcript of the proceeding overwhelmingly reveals numerous errors and inequities, all of which prevented Patrolman Evans from receiving a fair trial.

BY ATTORNEY:

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/s/ Charles A. "Sam" Jones, III
CHARLES A."SAM" JONES, III

C-97-1106

JOHNNY M. EVANS, SR.	:	36TH JUDICIAL DISTRICT COURT
VERSUS	:	PARISH OF BEAUREGARD
DE RIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD	:	STATE OF LOUISIANA
FILED: August 30, 2000	:	s/s Robbie Hennesey DEPUTY CLERK

REASONS FOR JUDGEMENT AFFIRMING BOARD RULING

This matter is before the Court for a judicial review on the petition of Johnny M. Evans, Sr. After reviewing the record and considering the applicable law, the Court has determined that the findings of fact of the Civil Service Board are supported by sufficient competent evidence and, thus, are conclusive for the purpose of this appeal.

Further, this Court has determined that the legal conclusions of the Board of Review, on the facts found, are correct as a matter of law and justify the agency action. Pursuant to the jurisprudence of this State, this Court's jurisdiction is generally limited to questions of

law; the facts found by the Review Board must be accepted as the basis for this judicial review, if those facts are supported by sufficient evidence and in the absence of fraud. The standard for review is noted in Ned v Lake Charles Municipal Fire & Police Civil Service Board., 721 So.2d 577, 581, (La. App. 3 Cir. 1998) :

> "In deciding whether to affirm a Board's factual findings, an appellate court should apply the clearly wrong or manifest error rule. Recasner v Department of Fire, 94-815 (la. App. 4 Cir. 11/17/94) 645 So.2d 1291; Walters v DeQartment of Police of the City of New Orleans, 454 So.2d 106 (La. 1984) ..."

and further, as noted in Montgomery v DeQartment of Streets, 593 So.2d 1352, 1355, (La. App. 4 Cir. 1992) :

> "Generally, a decision of the Civil Service Commission will not be overturned by the appellate court unless it was arbitrary, capricious, or an abuse of discretion."

Further, the standards for the underlying process required in such cases is noted in Cannon v City of Hammond. 727 So.2d 570, 727 (La. App. 1 Cir. 1998) , as follows:

> "Pursuant to Article 10, Section 12 of the Louisiana Constitution, the Hammond Fire and Police Civil Service Board has the exclusive power and authority to hear and decide removal and disciplinary cases involving police officers serving in the City of

> Hammond's classified civil Service. A decision of the Board is subject to review on any question of law or fact appealed to the court of appeal. ...On appellate review, findings of fact of the Board are not to be overturned in the absence of manifest error, and the Board's conclusion as to the existence or absence of cause for dismissal should not be disturbed unless the decision is capricious or an abuse of the Board's discretion. Dumez v Houma MuniciDal Fire & Police Civil Service Board, 408 So.2d 403, 406."

Evans, the appellant in this case was afforded the due process of a full hearing before the local Civil Service Board at which he was represented by counsel, who vigorously asserted appellant's rights and legal positions to the Board. The Board did hear conflicting testimony. The appellant denied having told his son (Johnny M. Evans, Jr.) and a friend (Eric L. Pickens) that Earnest Lee Prater was a police undercover agent. Prater was later the subject of a homicide for which both Evans, Jr. and Pickens were convicted in the 30th Judicial District Court. The countervailing evidence for this is the statement of Pickens himself where he admits his involvement in the death and tells the police that he and Evans, Jr. learned of Prater's informant status from Evans, Sr. This statement by Pickens was

bolstered by a polygraph examination taken of Evans, Sr. as a result of which the polygraphist concluded that Evans, Sr. had not told the entire truth to all of the pertinent questions concerning whether he (Evans, Sr.) had revealed to anyone that Prater was an informant for the police. The Board's findings make it clear that the polygraph examination results were crucial in resolving issues of credibility with respect to the statements made by the witnesses. Determining the weight and credibility of the evidence is clearly within the province of the Board; indeed it is their duty in such cases. Appellant complains that neither the Pickens statement nor the polygraph exam are reliable and should not have been admitted. We disagree.

First, as to the Pickens statement, counsel argues that it violates Rule 10 of the Civil Service Commission's own rules. Though appellant is not specific as to the part of Rule 10 to which he refers, it appears that a violation of Rule 10.6 is urged. It provides:

> "Affidavits and ex-parte statements shall not be received except by consent of the parties unless used to refresh memory or to discredit a witness."

It is the Court's belief that this rule by its wording anticipates that the witness be available to testify, hence the use of "refresh memory" or "discredit" in the exception portion of the rule. The Court also notes that Rule 10.4 provides:

> "The rule of evidence as applied in civil trials before the court of this state need not be strictly complied with, but the board shall limit evidence to the matters having a reasonable relevance to the issues before the board." (Emphasis added)

Counsel for the Board notes correctly in his post hearing memorandum, that when a witness is unavailable under the provisions of La. C.E. 804(B) (3) & {6) such statements are an exception to the hearsay rule and may be admitted.

Pickens was called to testify; he invoked his right against self incrimination under the 5th Amendment of the U. S. Constitution, as he had not yet been tried on criminal charges arising out of the Prater homicide. This made him an unavailable witness under the provisions of La. C.E. Article 804 and his statement, which is clearly against his interest in the admissions that he made and hearsay, is admissible in evidence under the exceptions provided by La. C.E. Article 804(B) and is competent evidence. Further, hearsay is

admissible even without the use of this exception. The Fourth Circuit Court of Appeals noted in Gant v Department of Police, 750 So.2d. 382, 387 {La. App. 4 Cir. 2000) :

> "Further, we fail to find that the proffered testimony was inadmissible on the basis of hearsay. Pretermitting a consideration of whether this testimony constitutes hearsay, we note that the usual rules of evidence do not apply in administrative hearings. Hearsay is admissible..."

That the Board chose to believe this statement by Pickins and not the testimony of Evans, Sr. is their right.

Second, as to the admissibility of the polygraph examination and the expert opinion of the polygraphist, the Court is of the opinion that the Board did not err. While it is true that in criminal cases the admission of polygraph examinations into evidence is not permitted. Appellant's counsel correctly notes that in State v Catanese, 368 So.2d 975, 981 (La. 1979) , the Louisiana Supreme Court held:

> ". ..after considering the evidence in the instant case and studying the authorities and extensive literature in the field, we conclude that it shall be the judicial policy of Louisiana to exclude polygraph evidence in criminal trials at this time."

However, appellant's counsel fails to note that the Louisiana Supreme Court in Catanese goes on to say at page 982:

> "Although we conclude that polygraph evidence is inadmissible in criminal trials, the reasons for our decision do not prevent its introduction in post trial proceedings, within judicial discretion. ... Because the defendant's guilt or innocence is not at issue in such proceedings, there is less demand for the rigorous guarantees of accuracy which typify the rules governing introduction of evidence at trial."

This language clearly suggests that outside of the criminal trial process polygraph evidence is admissible within judicial discretion. Indeed, the Second Circuit noted this distinction in connection with civil cases as noted by counsel for appellee in the case of Rebouche v Anderson, 505 So.2d 808, (La. App. 2 Cir. 1987) , where it noted that while the Supreme Court in Catanese had declared polygraph examinations inadmissible in criminal trials:

> "the language in Catanese indicated that admissibility in proceedings other than criminal trials is largely within the discretion of the trial court" Id at p. 815.

As noted from the citation above of Civil Service Commission Rule 10.4, the rules of evidence to be applied in these hearings are those

applicable to civil trial, not criminal trials. Further, the civil trial rules of evidence "need not be strictly complied with."

The cases cited by the appellant counsel in his post hearing memorandum, including Rebouche above, all involve situations where the reviewing court in its discretion elected to exclude the polygraph examination due to some irregularities peculiar to the case. For example, in the case of Arnold v New Orleans Police DeDartment, 383 So.2d 810, (La. App. 4 Cir. 1980), the police officer and his combatant were so intoxicated that their memory of the events was genuinely not reliable; hence, the Court concluded that the polygraph examination was flawed. The Court of Appeals held that such exclusion was not an abuse of discretion. The issue of the reliability of the polygraph examination in non-criminal cases must be decided on a case by case basis. There does not appear to be any irregularity in the process in the instant case; the conditions appeared to be optimum as required by Catanese.

In a related vein it should also be noted that the Third Circuit Court of Appeals has held in Rowe v State Farm Mutual Auto Ins. Co., 670 So.2d 718, 728 (La.App. 3 Cir. 1996) as follows:

> "As a general rule, the factual basis of an expert's opinion goes to the creditably of the testimony, not its admissibility, and it is up to the opposing party to examine the factual basis of the opinion in cross-examination. Loudermill v Dow Chemical Co., 863 F.2d 566, (8th Cir. 1988) .

This is exactly what occurred at appellant's hearing before the Civil Service Board. The polygraphist was vigorously questioned by both counsel at the hearing in the presence of the Board. The Board obviously weighed his testimony along with that of the appellant and reached their conclusion. The Board's right to weigh the credibility of the witnesses is unquestioned. The Court finds sufficient competent evidence in the record of these proceedings, which, if believed by the Board, is adequate to support their findings by a prepon- derance of the evidence. See Matthews v Department of Police, 723 So.2d 1044, 1047 (La.App. 4 Cir. 1998) :

> "The Appointing Authority has the burden of proving by preponderance of the evidence the occurrence of the complained of activity and that the conduct complained of impaired the efficiency of the public service. The appointing authority must also prove the actions complained of bear areal and substantial relationship to the efficient operation of the public service. ..." (Citations omitted)

The Board concluded that appellant revealed the identity of the confidential informant. Such activity greatly impairs the drug undercover activity and makes the recruitment of future undercover agents or informants difficult, as they cannot but question their continued anonymity and safety, given the experience of Earnest Lee Prater in these circumstances. There is no manifest error in the Board's findings nor arbitrary or capricious abuse of discretion in its conclusions. The decision of the Board is affirmed.

Dated, DeRidder, Parish of Beauregard, State of Louisiana, this 26th day of August, 2000.

s/s Stuart S. Kay, Jr., District Judge

COURT OF APPEAL
THIRD CIRCUIT
STATE OF LOUISIANA

APPEAL DOCKET NO. 01-00118-CA

JOHNNY M. EVANS, SR.
Appellant

vs.

DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD
Appellee

CIVIL APPEAL

ON APPEAL FROM JUDGMENT
OF THE THIRTY-SIXTH JUDICIAL
DISTRICT COURT, IN AND FOR THE
PARISH OF BEAUREGARD,
STATE OF LOUISIANA,
THE HONORABLE STUART S. KAY, JR.
DISTRICT JUDGE
TRIAL DOCKET NO. C-97-1106 A

ORIGINAL BRIEF ON
BEHALF OF APPELLANT
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Smith v. Gonzales, 670 F. 2nd 522, 528 (5th Cir. 1982), cert. Denied, 459 U.S. 1005, 103 S.Ct. 361, 74 L.Ed.2d 397 (1982)

John G. Manale v. Department of Police, 376 So. 2d 607 (La. App. 4th Cir. 1979)

Glenn A. Arnold v. New Orleans Police Department, 383 So. 2d 810 (La. App. 4th Cir. 1980) writ denied June 6, 1980

GROUNDS FOR JURISDICTION

This is an appeal from a final judgment in a civil case. This Court has jurisdiction to decide this appeal based upon Louisiana Constitution Article 5 Section 10(A).

BRIEF STATEMENT OF THE CASE

The appellant, JOHNNY M. EVANS, SR., has been in law enforcement nearly his entire life. He was in the military police for fourteen (14) years while serving in the United States Army, during which, he worked as a military police with a top secret clearance rating. Following his military career, Officer Evans was employed with the Beauregard Parish Sheriff's Office for two (2) years and finally with the DeRidder City Police for four and a half (4 ½) years. Law enforcement was his life. In 1997, while employed with the DeRidder City Police Department, it was alleged that Officer Evans disclosed the identity of a confidential informant (Ernest Prater, Jr.) to his son, Johnny Evans Jr., and Eric Pickens. Ernest Prater, Jr., was the victim of a homicide and Johnny Evans, Jr. and Eric Pickens

were later charged and convicted of the homicide of Ernest Prater, Jr., in the 30th Judicial District, Parish of Vernon. A criminal investigation was conducted against the appellant, Johnny M. Evans, Sr., and no evidence was found and he was cleared of any charges. However, his employment was suspended pending a hearing by the Civil Service Board. The Civil Service Board voted to terminate his employment and it is from this ruling that he seeks the review of this Honorable Court.

DETAILED STATEMENT OF FACTS

The Plaintiff, JOHNNY M. EVANS, SR., was terminated from his employment with the DeRidder City Police Department by letter dated October 29, 1997. The termination became effective October 31, 1997 at 4:00 o'clock p.m. Reasons for his termination were set forth in a letter from Chief of Police, Arvin Malone, dated October 29, 1997 which stated, in pertinent part:

> "1. Patrolman Evans is a friend of Pickens:
> A. There is no logical reason Eric would makeup such a story on a friend.
> 2. Eric made accusations before he was a suspect and again after becoming a suspect.

3. It is apparent Eric and Johnny Evans, Jr., knew or Earnest Prater's connection with Law Enforcement as this is the motive established by the Vernon Parish Sheriff's Department for the homicide.

A. Many times different people are thought to be Confidential Informants For Law Enforcement, sometimes true, but many times not so. Based on "Street Talk", there has been no such retaliation against people accused of being Confidential Informants as the suspects are accused of doing. This would indicated that they most likely had a strong confirmation from someone in position to know for Certain what Prater's connection was with Law Enforcement, Officer Evans knew of this connection. Granted other Law Enforcement Personnel knew of the connection, but none of them have been accused of leaking the information to the suspects, Officer Evans has been.

Possible Motivation for Ptn. Evans to disclose the identity of Prater:

1. To protect his son from possible arrest.
   A. Knew son was suspected of possible drug activities.
2. To protect Eric Pickens from possible arrest.
   A. Eric is a friend.

Possible Reasons for Ptn. Evans to deny accusation:

1. Accusation may not be true.
2. To protect himself f rom possible criminal charges.
3. To protect himself from possible civil liability.
4. To protect himself from possible administrative sanctions.
5. To maintain his credibility and trust of the public, fellow officers, other law enforcement agencies, and Criminal Justice Entities; Judges, District Attorney,

etc.

The appellant, Johnny Evans, Sr., was ordered to take a polygraph examination under the threat of termination of employment, see letter from Chief Arvin Malone dated September 25, 1997 (Transcript, Ex. 3). As stated by the examiner, "The results of the test indicated that Officer Evans wasn't being truthful when he denied disclosing the identity of Earnest Prater to Eric Pickens and Johnny Evans, Jr."

On November 3, 1997, the undersigned counsel filed a request for a hearing before the DeRidder Municipal Fire and Police Civil Service Board (hereinafter referred to as the "Board") on the employment termination of Officer Johnny M. Evans, Sr. A hearing was scheduled for December 18, 1997. On December 18, 1997, a hearing was held to determine if the termination of Officer Johnny M. Evans, Sr., was taken in good faith for cause. The Board found that the evidence was conclusive and affirmed the termination of Officer Johnny M. Evans, Sr. (Transcript pp. 203-205).

The Board relied solely on the results of the polygraph examination of Plaintiff, Johnny M. Evans, Sr., and did not take into consideration any conflicting evidence which was presented at the hearing by undersigned counsel. Little, if any, evidence was adduced or exists substantiating the assumptions, innuendos and unjustified conclusions asserted in the letter of termination from chief Arvin Malone, none of which would be sufficient, even if proven, to support the decision of the Board.

Ultimately, the Board, through their counsel, David Lestage, stated that they relied solely on the results of the polygraph test, wherein it is stated that,

> "**By Mr. Lestage:** "we'll concede that. I mean, that has nothing to do with the matter at hand. This line of questioning is irrelevant. If the Commission will turn to the top of page three of the discharge letter, it says, "Because of the seriousness and nature of the accusation, officer Evans was ordered to submit to a polygraph examination in order to boost the credibility of the accused and/or accuser." **That's what we're here about**. We're not here about Eric

Pickens and whether he told the right version the first time, the second time, the third time, or whether he can reconcile all three versions. He might be able to reconcile why all three are true. But that's not for us, and it not - - certainly for Chief Malone to decide now, nor to have decided on October 29, and we'd object to this line of questioning."

By Mr. Jones: "Mr. Chairman, again his argument is inconsistent with the letter. The letter of termination says: **We're relying on the credibility of Pickens.** His argument flies in the face of that, and they're trying to squirm away from it as hard as they can; because he's a liar, and we've caught him lying every time he's turned around in these statements. And this termination letter says: **We are relying on the credibility of Pickens and the polygraph**. But now, since its very inconvenient to rely on the credibility of Pickens because he's lying everywhere, they want to just rely on the polygraph. And I ask you not to let them do that. I ask you to let me explore the inconsistencies so I can get them on the record".

Chairman Williams: We're kind of wandering way off too far.

Mr. Jones: I only have one other question in this line, and I'll move on after that, Mr. Chairman.
Q. (Mr. Jones) Are you aware that, in his statement to Detectives Hagan and Smith, Eric Pickens indicates on page ten that he does not Know J.J. Johnson?

Mr. Lestage: Again, Mr. Chairman, I'm going to have to object. Whether any of us know J.J. Johnson is beside the point. It's just not relevant.

Chairman Williams: Sustained

Mr. Jones: I can't get into this other lie to show this last inconsistency, Mr. Chairman?

Chairman Williams: No, sir.

Mr. Jones: Well, I'd ask to proffer it in, then. And I need to ask Chief Malone a question in order to complete my proffer.

Chairman Williams: Okay.
Q. (Mr. Jones) Chief Malone, were you aware that on August 16, 1997, Eric Pickens did an undercover buy from J.J. Johnson of drugs?
A. I was aware there was some involvement there. I don't know all

of the details on it, but I was aware that there was some transaction there somehow.

Mr. Jones: That completes my proffer on that question, Mr. Chairman."

Appellant, Johnny M. Evans, Sr., contends that his termination was without **good faith and cause** and it is from the Board's decision that he sought review from the 36th Judicial District Court.

On December 29, 1997, the undersigned counsel filed a Notice of Appeal with the Secretary of the Board. The Appeal, together with a transcript of the hearing and all exhibits were forwarded to Honorable Stuart S. Kay, Jr., District Judge of the 36th Judicial District Court for a determination of this matter in a summary manner.

On August 30, 2000, Hon. Stuart S. Kay, Jr., affirmed the decision of the Board (Transcript pp. 29-34). Further, a Judgment was signed in Chambers on October 9, 2000 (Transcript p. 35).

LAW

Louisiana Revised Statute 33:2561 sets forth the appeal process in Civil Service Hearings, it is from this statute that appellant, JOHNNY M. EVANS, SR., sought documentary review with the 36th Judicial District Court and further seeks review from this Honorable Court, the 3rd Circuit Court of Appeals.

The above statute allows for the appellate court to review an administrative disciplinary decision against public employee. However, this review is limited to the determination of whether the decision was made in good faith and for legal cause. The decision must of the Board must be affirmed unless the record contains insufficient evidence or shows that the decision was clearly wrong.

Additionally, and only in the event that it is found that the decision of the Civil Service Board was made in good faith and for legal cause, there must be **sufficient evidence** to support the administrative decision. City of Abbeville v. Abbeville Fire and

Police, 599 So. 2d 508 (La. App. 3 Cir. 1992) writ denied 604 So. 2d 1308.

It is respectfully submitted that sufficient evidence is synonymous with "competent" evidence. The decision of the Civil Service Board of the City of DeRidder must be based on competent evidence. Incompetent evidence will not be considered on appeal. Ruddock v. Jefferson Parish Fire Civil Service Board, 688 So. 2d 112 (La. App. 5th Cir.).

Further, the issue of whether the decision of the appointing authority or of the Board was "made in good faith for cause" is construed to mean that the action of the appointing authority, in order to be valid must be **both** "in good faith" and "for cause". The action of the authority must be set aside if it was not taken "for cause" even though it may have been taken in good faith. Martin v. City of St. Martinville, 321 So. 2d 532 (La. App. 3 Cir. 1975) writ denied 325 So. 2d 273.

The burden of proof of the appointing authority in a proceeding challenging termination of a civil service employee is

by a preponderance of the evidence. Although the facts must be clearly established, they need not be established beyond a reasonable doubt as in a criminal case. Ruddock v. Jefferson Parish Fire Civil Service Board., 688 So. 2d 112 (La. App. 5 Cir.)

In the recent case United States v. Edward G. Scheffer, 118 S. Ct. 1261 (U.S. S.Ct. 1998) , the United States Supreme Court held "**There is simply no consensus that polygraph evidence is reliable**." Consistent with the Scheffer case, Louisiana Courts have excluded such evidence in both civil and criminal cases.

In State vs. Catanese, 368 So. 2d 975 (La. 1979) , the Court ruled that:

". . . after considering the evidence in the instant case and studying the authorities and extensive literature in the field, we conclude that it shall be the **judicial policy of Louisiana** to exclude polygraph evidence in criminal trials at this time."

The Court further stated in Catanese that:

". . . Our fundamental concern is that the trier of fact is apt to give almost conclusive weight to the polygraph expert's opinion. . . extensive procedural safeguards should be established either by court rule or legislation before the introduction of polygraph tests at trial. . . . In our judgment there has not yet been enough judicial experience with polygraph evidence in Louisiana to provide an adequate basis for judicial rule making on this scale".

After a full reconsideration of the problem of lie detector evidence, the Court in State v. Hocum, 456 So. 2d 602 (La. 1984) declared it to be the judicial policy of Louisiana to exclude, for any purpose, polygraph evidence in criminal trials. The principal reasons for such exclusion were stated to be (1) the propensity of triers of fact to give conclusive weight to the polygraph expert's opinion; (2) The lack of a regulatory program for maintaining an adequate level of examiners' ability, experience, education, integrity and availability and (3) The need

for procedural rules and safeguards governing the introduction of polygraph evidence. State v. Catanese, supra at 981. See also State v. Whitmore, 353 So. 2d 1286 (La. 1978); State v. Davis, 351 So. 2d 771 (La. 1977); State vs. Schouest, 351 So. 2d 462 (La. 1977); State v. Weeks, 345 So.2d 26 (La. 1977); State v. Governor, 331 So. 2d 443 (La. 1976); State v. Corbin, 285 So. 2d 234 (La. 1973); State v. Refuge, 270 So. 2d 842 (La. 1972). ". . . Subsequently, this court made it clear that the Catanese rule excluding polygraph evidence for any purpose from criminal trials also operates to prevent any reference during trial to the fact that a witness has taken a polygraph examination with respect to the subject matter of his testimony. State vs. Tonubbee, 420 So. 2d 126 (La. 1982); State v. Davis, 407 so. 2d 702 (La. 1981).

CIVIL JURISPRUDENCE

In Edmon O. Hines vs. Arkansas Louisiana Gas Company, et al, 613 So. 2d 642 (La. App. 2nd Cir. 1993) the court agreed that ". . . results of a polygraph examination would

be inadmissable", the court ruled that a plaintiff could present testimony concerning his offer to take the test . Furthermore, the exclusion of such evidence in civil cases has been consistently upheld on appeal. Rebouche v. Anderson, 505 So. 2d 808 Ola. App. 2nd Cir. 1987), writ denied 507 So. 2d 228 (La. 1987); Associates Financial Corporation v. Carrick 441 So. 2d 1311 (La. App. 2nd Cir. 1983). Indeed, the federal Fifth Circuit Court of Appeal has noted adherence to an unequivocal rule of exclusion, making no exception for civil cases, even in instances where the polygraph results are purportedly offered for a purpose other than asserting the truth of the statements contained therein. See Barrel of Fun, Inc. v. State Farm Fire & Casualty, 739 F.2d 1028, 1031 (5th Cir. 1984); Smith v. Gonzales, 670 F. 2d 522, 528 (5th Cir. 1982), cert. denied, 459 U.S. 1005, 103 S.Ct. 361, 74 L.Ed. 2d 397 (1982). ". . . the foremost reason for disallowing such evidence rests with its exaggerated, prejudicial effect upon the triers of fact". In Accord, E. Clearly, McCormick's Handbook on the Law of Evidence, 207 at page

507 (2d E. 1972), it states that present-day jurors, despite their sophistication and increased education levels and intellectual capabilities, are still likely to give significant, if not conclusive, weight to such evidence. U.S. v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975). In the case before this Honorable Court, the Civil Service Commission for the City of DeRidder relied strictly on the polygraph evidence and affirmed the termination of Officer Johnny M. Evans accordingly.

In John G. Manale vs. Department of Police, 376 so. 2d 607 (La. App. 4th Cir. 1979), the New Orleans Civil Service Commission used the rule from a criminal case (no polygraph evidence is admissible) and applied it to its' administrative case. The Fourth Circuit Court of Appeals upheld this application. In Manale, the Court relied on the authority of State v. Corbin, 285 So. 2d 234 (La. 1973) and found that the polygraph test was inadmissable and concluded that the City's case had to stand or fall without the results of the test.

In Glenn A. Arnold v. New Orleans Police Department, 383 So. 2d 810 (La. App. 4th Cir. 1980) writ denied June 6, 1980, a Civil Service Commission case similar to the instant case wherein an Officer was terminated from his employment, it was the Court's ruling that the Civil Service Board did not err in refusing to accept results of polygraph test. ". . . Excluding the results of the polygraph tests, the question remains whether the evidence in the record supports the appointing authority's action by a preponderance of the evidence".

Notwithstanding the propriety of the polygraph, the test results alone or the test results coupled with the unsupported suggestions and assertions of Chief Arvin Malone's termination letter are insufficient to support the Commissions actions. Previous actions of Appellant are also inconsistent with the allegations. On or about June or July, 1997, JOHNNY M. EVANS, contacted Betty Pichon and Saul Wilson of the Narcotics Task Force due his son's possible involvement in drug activity. Officer Evans advised these officers that his son was

beginning to have expensive things and he didn't feel as if he was making that much money at his present job. Officer Evans asked them if they would check him out to see if he was involved with drugs (Transcript p. 38).

BY ATTORNEY:

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VERIFICATION OF ORIGINAL BRIEF ON APPEAL

STATE OF LOUISIANA

PARISH OF BEAUREGARD

BEFORE ME, the undersigned Notary Public, personally came and appeared CHARLES A. "SAM" JONES, III, who, being by me first duly sworn, did depose and say that he is the attorney for the applicant in the above and foregoing brief on appeal and all facts contained therein are true and correct to the best of his knowledge, information, and belief, and that a copy of

this original brief on appeal has been served upon the David R. Lestage, counsel for the Defendant and the Honorable Stuart S. Kay, Jr., presiding judge, by delivering the same to them on this the 26th day of February, 2001.

/s) Charles A. "Sam" Jones, III
CHARLES A. "SAM" JONES, III

SWORN TO AND SUBSCRIBED before me, Notary Public, on this 26th day of February, 2001.

/s/ Shana M. Singletary
NOTARY PUBLIC

A-50

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT
P.O. Box 16577
Lake Charles, LA 70616
(337) 433-9403

David Ramsey Lestage **NOTICE OF JUDGMENT**
Hall, Lestage & Landreneau
P.O. Box 880
DeRidder, LA 70634

REHEARING ACTION: Augut 8, 2001

Docket Number: 01 00118-CA

JOHNNY M. EVANS, SR.
VERSUS
DERIDDER MUNICIPAL FIRE &
POLICE CIVIL SERVICE BOARD

Appealed from BEAUREGARD Parish Case No. C-97-1106 A

BEFORE JUDGES:

Hon. Sylvia R. Cooks
Hon. Billie Colombaro Woodard
Hon. Jimmie C. Peters

As counsel of record in the captioned case, you are hereby notified that the application for rehearing filed by DeRidder Municipal Fire & Police Civil Service Board has this day been

DENIED

FOR THE COURT

Kenneth J. deBlanc
Clerk of Court

cc: Charles A. Sam Jones, III, Counsel for the Appellant

COURT OF APPEAL
THIRD CIRCUIT
STATE OF LOUISIANA

APPEAL DOCKET NO. 01-00118

JOHNNY M. EVANS, SR.
Plaintiff - Appellant

v.

DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD and THE CITY OF DERIDDER, LOUISIANA
Defendants - Appellees

APPEAL FROM THE THIRTY-SIXTH JUDICIAL DISTRICT COURT,PARISH OF BEAUREGARD, STATE OF LOUISIANA

HONORABLE STUART S. KAY JR. - PRESIDING JUDGE

OPPOSITION TO DEFENDANT'S APPLICATION FOR RE-HEARING

RESPECTFULLY SUBMITTED:
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Attorney for Plaintiff - Appellant
JOHNNY M. EVANS, SR.

OPPOSITION TO DEFENDANT'S APPLICATION FOR RE-HEARING

I.) The City of DeRidder first suggest that reliance by this Honorable Court of Appeals on U.S. v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed. 2D 413 (1998) erroneously excludes polygraph evidence, per se; that such evidence was properly admitted.

This argument erroneously presumes exclusive reliance upon United States vs. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L. Ed. 2d 413 (1998). To the contrary, the polygraph results/demarcations and Mr. Trahan's interpretation of the same were correctly defined as an attack on Patrolman Evans' credibility, "based on particular acts - his responses to Mr. Trahan's questions", and thus, inadmissible under Louisiana. Code of Evidence Article 608(A) and (B).

In reviewing the action of the Civil Service Commission in this case, this Honorable Appellate Court found it unnecessary to consider, in depth, the substance of the polygraph test. Had

such been necessary, the record is replete with evidence of the unreliability of the same. The testimony of the polygrapher is riddled with conclusions drawn from physiological reactions of Patrolman Evans, requiring, at a minimum, a degree of medical training.

> Q. ". . . In connection with your licensing to become a polygrapher, did you receive any medical training or education?
>
> A. No, sir." (Tr. p. 160, ll. 9-12).

Further, the polygrapher had a total lack of knowledge as to the inner functions of the machine he used (Tr. p. 129 ll 10-19).

Assuming, arguendo, that it had been necessary to further examine the substance of the testimony given by the polygrapher, ample justification exists for its exclusion.

> " . . . if an expert opinion is so fundamentally unsupported that it can offer, no assistance to the jury, then the testimony should not be admitted at all." Rowe vs. State Farm, 670 So. 2d 718 (La. App. 3 Cir. 1996) citing

Viterlo v. Dow Chemical Co., 826 F. 2d 420 (5th Cir. 1987).

II. The City of DeRidder asserts that this Honorable Court erred in finding only one statement of Eric Pickens was admitted at the Civil Service Hearing and that **the statement was untrustworthy**.

Eric Pickens declined to testify at the Civil Service Commission Hearing and asserted a Fifth Amendment privilege against self-incrimination (Tr. p. 53, ll. 3-10). After this assertion, counsel for the City of DeRidder chose **not** to have the Chairman direct Mr. Pickens to testify, notwithstanding the fact that the testimony sought was not inculpatory.

The previous ruling by this Honorable Appellate Court would apply to one or both statements made by Mr. Pickens. Further, this Honorable Court accurately noted the inconsistencies of Mr. Pickens' hearsay statements, both of which are inconsistent and unworthy. Simply put, they are statements made by a suspect of a murder, who, at the time, was

attempting to lead law enforcement away from his guilt.

In its application for rehearing, the City of DeRidder simply chooses to ignore certain inconsistencies previously noted by this Court.

III. The City of DeRidder asserts this Honorable Court erred in reviewing the Civil Service Boards admission of the Pickens' statements as being 1) unjustified and 2) contrary to Rule 10.4 of the Munciple Fire & Police Civil Service Board of DeRidder, Louisiana.

The City of DeRidder suggest that the statements of Eric Pickens were inculpatory as providing "motive" for Pickens' involvement. However, "motive" was not an element of proof for the State of Louisiana in its criminal charges against Mr. Pickens.

Further, the City of DeRidder made a tactical decision at the hearing to refrain from having the Chairman direct Mr. Pickens to answer questions posed to him. As the questions did not elicit inculpatory information, the City would have been well within its right to ask that the witness be directed to answer.

Mr. Pickens' hearsay statements would certainly have not be admissible had the City of DeRidder chose to make him testify at Patrolman Evans' hearing. The City of DeRidder now seeks to capitalize on its mistakes by consideration of evidence riddled with inconsistency and not subject to cross-examination.

This case is not proper for remand. The City of DeRidder seeks another "bite at the apple". This request would be made by all parties/appellees who are dissatisfied with appropriate appellate evidentiary assessments or the lack thereof.

There must be sufficient evidence to support this administrative decision. City of Abbeville v. Abbeville Fire and

Police, 599 So. 2d 508 (La. App. 3 Cir. 1992) writ denied 604 So. 2d 1308. It is respectfully submitted that sufficient evidence is synonymous with "competent" evidence. Incompetent evidence should not be considered on appeal. Ruddock v. Jefferson Parish Fire Civile Service Board, 688 So. 2nd 112 (La. App. 5th Cir. 1997) and George v. Department of Fire, 637 so. 2d 1097 (La. App. 4th Cir. 1994).

Appellant, JOHNNY M. EVANS, SR., respectfully request that the Request for Rehearing filed on behalf of the Defendants, DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD and THE CITY OF DERIDDER be dismissed.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing OPPOSITION TO DEFENDANT'S-APPELLEES FOR REHEARING has been forwarded to counsel for defendants, David R. Lestage, Attorney at Law at 207 W. 2nd Street, P.O. Box 880, DeRidder, Louisiana 70634 , and an original and four 94) copies of the aforementioned opposition has been duly served upon Honorable Kenneth J. deBlanc, Clerk of the Third Circuit Court of Appeals, P.O. Box 16577, Lake Charles, Louisiana 71616 by mailing the same, postage pre-paid and properly addressed.

DeRidder, Louisiana, this 16th day of July, 2001.

/s/ Charles A. "Sam" Jones, III
CHARLES A. "SAM" JONES, III

Judgment rendered June 27, 2001.
Application for rehearing may be filed
within the delays allowed by La. Code Civ.
P. art. 2166 or La. Code Crim.P. art. 922.

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

01-118

JOHNNY M. EVANS, SR.

VERSUS

DERIDDER MUNICIPAL FIRE &
POLICE CIVIL SERVICE BOARD

****

APPEAL FROM THE
THIRTY -SIXTH JUDICIAL DISTRICT COURT
PARISH OF BEAUREGARD, NO. C-97-1106 A
HONORABLE STUART s. KA Y , JR., DISTRICT JUDGE

****

BILLIE COLOMBARO WOODARD
JUDGE

****

Court composed of Sylvia R. Cooks, Billie Colombaro Woodard, and Jimmie C. -Peters, Judges.

REVERSED.

J David Ramsey Lestage
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COUNSEL FOR DEFENDANT/ APPELLEE:

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COUNSEL FOR PLAINTIFF/APPELLANT:
Johnny M. Evans, Sr.

WOODARD, Judge.

The Mayor of the City of DeRidder, Louisiana, tenninated Patrolman Johnny M. Evans, Sr ., from the police force on October 31, 1997. Patrolman Evans appealed to the DeRidder Municipal Fire and Police Civil Service Board (the Board), which upheld the Mayor's decision. Then, he appealed to the Thirty-Sixth Judicial District Court, which upheld the Board. He files the instant appeal, maintaining that the polygraph examination results should not have been admitted into evidence and that they substantially influenced the Board's decision.

We find that the trial court erred in upholding the Board's decision to admit the evidence. Accordingly, we reverse and restore Patrolman Evans to his position with back pay and allowances.

*****

On August 25, 1997, Mr. Johnny M. Evans, Jr. (Johnny), Patrolman Evans, Sr.'s son, and Mr. Eric Pickens killed Mr. Earnest Prater, Jr. Apparently, the killing occurred because the decedent had given the police department information which had led to Mr. Pickens' arrest for a drug-related offense.

Prior to finding Mr. Prater's killers, Mr. Pickens indicated to DeRidder law enforcement, on August 28, 1997, that he might have information about a motive in the murder. He told Sergeant John Gott, Lieutenant Ricky Johnson, and Sergeant Kenny Pine that, when he was at Patrolman Evans' home the previous week, Patrolman Evans told him that Mr. Prater worked for the police and had "busted" Mr . Pickens and another person.

During DeRidder Chief ofPolice, Arvin Malone's, investigation of this claim, he asked Patrolman Evans to take a polygraph test, which Patrolman Evans initially refused. Ultimately, ChiefMalone ordered him to comply or to be terminated. After Patrolman Evans took the test, the polygrapher opined that he had not told the entire truth on all of the pertinent questions; i.e., those related to whether he had divulged confidential information to unauthorized people. Upon receiving the polygrapher's report, Chief Malone recommended

Patrolman Evans' dismissal, effective October 31, 1997. Mayor Gerald Johnson approved the recommendation.

Patrolman Evans appealed to the Board. After a hearing on December 18, 1997, substantially relying on the polygrapher's testimony, the Board unanimously found that the alleged violation had occurred and that the appointing authority (the Mayor) had acted in good faith and for cause. Patrolman Evans appealed to the Thirty-Sixth Judicial District Court, which affirmed the Board's decision on October 9,2000. He files the instant appeal, seeking his reinstatement and claiming that the trial court erred when upholding the Board's decision to admit the polygrapher's expert opinion into evidence.

*****

DISMISSAL OF CIVIL SERV ANTS

An employee, who has gained permanent status in the classified city civil service, cannot be subjected to his employer's disciplinary action, including dismissal, except for cause.1 When determining "cause" for discharge, the Louisiana Supreme Court, in *Waiters v. Department of Police of the City of New Orleans,*[2] set forth "' [c]ause ' for the dismissal of a person who has gained permanent status in the classified civil service has been interpreted to include conduct prejudicial to the public service in which the

employee in question is engaged or detrimental to its efficient operation." In *Bannister v Department of Streets*,[3] the supreme court further elaborated on its *Waiters'* requirements, holding that "disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is areal and substantial relationship between the improper conduct and the 'efficient operation' of the public service."

A dismissal of a civil servant "for cause" is synonymous with legal cause.4 Namely, "[l]egal cause for disciplinary action exists if the facts found by the commission disclose that the conduct of the employee impairs the efficiency of the

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[1]La.Const. art. X, § 8(A).

[2]454 So.2d 106, 113 (La. 1984).

[3]95-404, p. 8, (La. 1/16/96); 666 So.2d 641,647.

[4] *Appointing Authority, Chief of Police for the City of Kenner v. Trippi,* 499 So.2d 1177 (La.App. 5 Cir. 1986); *City of Westwego v. McKee,* 448 So.2d 166 (La.App. 5 Cir. 1984), *writ denied,* 503 So.2d 22 (La. 1987).

public service."s La.R.S. 33 :2561 allows a public employee to apply to the Board for review of a discharge or disciplinary action. This statute limits the Board to "the question of whether the action taken against the employee was made in good faith for cause."

The burden of proving legal cause is on the appointing authority -in this case, the Mayor of DeRidder, Louisiana.6 Thus, the Mayor must demonstrate, by a preponderance of the evidence, that the conduct did, in fact, impair the public service's efficiency and orderly operation. It is the Board's duty to decide whether the appointing authority had good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed was commensurate with the dereliction. The Board has an obligation to uphold the Mayor's disciplinary action ifit finds sufficient cause.[7]

La.R. S .33 :2561 (E) further provides that the employee may appeal the Board's decision and that the court shall hear and determine the appeal in a summary manner. Similar to the requirements imposed upon the Board, La.R.S. 33:2561(E) mandates that the district court's review be "confined to the determination of whether the decision made by the board was made in good faith for cause[.]" On appeal, when reviewing the Board's findings of fact, we must apply the manifest error standard to factual findings and then consider

whether the action of the court is arbitrary, capricious, or an abuse of discretion.[8]

The Mayor has the burden of proving his case by a "preponderance of the evidence." The Board's findings must be based on *competent* evidence, as appellate courts will not consider incompetent evidence on review .[9] Although, we must find the facts to have been clearly established, they need not have been proven beyond a "reasonable doubt," as in a criminal case. It is beyond question that if Patrolman Evans revealed the name of a confidential informant

[5] *Appointing Authority, Chief of Police for the City of Kenner* , 499 So.2d at 1180 (citing *Leggett v. Northwestern State College,* 242 La. 927,938, 140 So.2d 5, 9 (1962)). *See also, Ruddock v. Jefferson Parish Fire Civil Serv. Ed.*, 96-831, p. 2 (La.App. 5 Cir. 1/28/97); 688 So.2d 112, 114.

[6] *Id.*

[7] *Id.*

[8] *Walters,* 454 So.2d 106.

[9] *George v. Department of Fire,* 93-2421 (La.App. 4 Cir. 5/17/94); 637 So.2d l 1097.

to those unauthorized to possess such information, sufficient legal cause would exist to terminate his employment. However, we must decide whether the Board's evidence was *competent* and sufficient. Specifically, among other evidentiary issues, we must determine, apparently for the first time in our circuit, whether polygraph examination results are admissible in civil proceedings. The crux of the Mayor's case consisted of the polygrapher's report and testimony. Mr. Calvin Trahan administered the test, interpreted the results, and, originally, sent his report to Chief Malone. After receiving it, Chief Malone terminated Patrolman Evans. In turn, the Board considered the report, during the I termination hearing, over Patrolman Evans' counsel's vigorous challenge. The trial court upheld the Board's admission, finding that the exclusion of polygraph evidence in criminal trials' did not, *per se,* require its exclusion in other proceedings.

PRELIMINARY CONSIDERATIONS ON POLYGRAPH

Although the trial court misapplied *Catanese*[10] in support of its admission of the evidence, it correctly recognized that polygraph results, generally, are inadmissible in criminal trials.[11] This hard line is understandable, as there, simply, is no consensus that polygraph evidence is reliable.[12] In fact, the scientific community remains extremely polarized about polygraph techniques' reliability.

[11] *OState* v. *Catanese,* 368 So.2d 975 (La. 1979). *!!Id.*

[12] *U.S.* v. *Scheffer,* 523 U.S. 303, 118 S.Ct. 1261(1998). *!3Id.* at 1265 n.6.

Furthermore, assuming that "the basic debate about the reliability of polygraph technology itself were resolved, however, there would still be controversy over the efficacy of countermeasures, or deliberately adopted strategies that a polygraph examinee can employ to provoke physiological responses that will obscure accurate readings and thus 'fool' the polygraph machine and the examiner."[13]

The machine "simultaneously and continuously measures and records . . . physiological reactions on a graph or chart (polygram). Respiration is measured by pneumatic tubes attached to the subject's chest and abdomen; cardiovascular activity is measured by a blood pressure cuff (Sphygmomanometer) strapped around his upper arm or wrist and forearm; and perspiration (galvanic skin response) is measured by electrodes that are attached to the subject's fingertips."[14]

While the machine appears to produce straightforward and reliable physiological measurements, the examiner's method of questioning, as well as his or her interpretation of the results, may not. Therein lies an acute danger. "[T]he individual skill and training of examiners. ..affects the reliability of a polygraph. Clearly, 'bells do not go off' at the moment someone tells a lie. Rather, the polygraph's ability to discern the truth rests in the skill of examiners. ' Although an adequate instrument is essential for proper testing, the

role of the examiner in interviewing the examinee, designing test questions, and evaluating and interpreting the polygram is much more critical to an accurate diagnosis than is the mechanical function of the polygraph itself.' Thus, the skill of examiners fundamentally affects the ultimate reliability of the test."[15]

However, one of the main reasons which bolsters polygraphs' prohibition in legal proceedings involves, not only the issue concerning its reliability but, also, its probative value or relevancy. Apparently, *there is no scientifically proven cause and effect connection between an increase in the pertinent physiological reactions and "truth telling.* " Indeed, some authors noted that "[t]he heart of the present critique of the polygraph is that *no theory that ties deception (or any criminal activity) with physiological reactions has been formulated.* Furthermore, there is 'no known physiological response that is unique to deception, , and all physiological measures used for polygraph tests are sensitive to, and can be elicited by, a host of factors other than deception or criminal activity. If deception is not uniquely related to physiological reactions, and theory cannot explain the nature of the relationship, it is

[14] Lisa A. Bonsignore, *The Employee Polygraph Protection Act of* 1988: *Assessing the Validity of Banning Pre-Employment Screening of Job Applications,* 6 J. SUFFOLKAcAD. L. 159, fu. 10 (1989).

[15] Yvonne Koontz Sening, *Heads or Tails: The Employee Polygraph Protection Act,* 39 CATH.U.L. REv. 235,264 (1989) (footnotes omitted).

impossible to predict the conditions under which polygraph test results will be accurate or inaccurate.[16]

Until now in Louisiana courts, "the foremost reason for disallowing such evidence rests with its exaggerated, prejudicial effect upon the triers of fact.[17] [18] This is motivated by the experience that "'present-day jurors, despite their sophistication and increased education levels and intellectual capabilities, are still likely to give significant, if not conclusive, weight' to such evidence, [19]"[20] which is obviously what happened in the case *sub judice*.

Generally, trial judges have a gatekeeping function and vast discretion when 1 determining whether to admit expert testimony . However, the expert's opinion must be based upon correct assumptions of facts and supported by the record.[22] Additionally, the expert's testimony must be both reliable and relevant.[23] "[A]n expert is one who, usually by education or experience, has a *unique* lmowledge of the subject matter at issue[.][24] It is appropriate to admit reliable, relevant expert testimony when the expert has *specialized* knowledge to assist the trier of fact in its fact-finding function.[25]

[16] Leonard Saxe and Gershon Ben-Shakhar, *Admissibility of Polygraph Tests the Application of Scientific Standards Post-Daubert,* 5 PSYCHOL. PUB. POL 'Y & L 203,219 (1999) (citation omitted) (emphasis added).

[17] (Citing in accord, E. C1eary, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE, § 207 at 507 (2d. 1972».

[18] *Hines v. Arkansas La. Gas Co.,* 613 So.2d 646,650 (La.App. 2 Cir. 1993), *writ denied,* 617 So.2d 932 (La. 1993).

[19] (Citing *US. v. Alexander,* 526 F.2d 161, 168 (8th Cir. 1975).

[20] *Hines* 613 So.2d at 650.

[21] *See Tullis v. Rapides Parish Police Jury,* 95-905 (La.App. 3 Cir. 1/17/96); 670 So.2d 245, *writ not considered,* 96-444 (La. 3/29/96); 670 So.2d 1241.

[22] *Id.*

[23] *Sandell v. Hooter,* 96-1062 (La.App. 3 Cir. 2/26/97); 692 So.2d 474, *writ denied,* 97-801 (La. 5/1/97); 693 So.2d 730.

[24] *Barrett v. J:L. James & Co.,* 28,170, p. 12 (La.App. 2 Cir. 4/3/96); 671 So.2d 1186, 1194, *writ denied,* 96-1124 (La. 6/7/96); 674 So.2d 973 (emphasis added).

[25] La:Code.Evid. art. 702, *see State v. Bosworth,* 593 So.2d 1356, 1360 (La.App. 4 Clr.), *wrIt denIed,* 600 So.2d 658 (La. 1992).

The polygraph has been coined as a "lie-detector ." In other words, its very purpose serves to determine whether a person is telling the truth. In our legal system, this function is precisely within the trier of fact's role. In fact, we call upon fact finders to use their personal life experience, common knowledge, and intuition to determine credibility -whether a litigant or witness is telling the truth. Impliedly, we treat our fact finders as "experts" in the truth telling arena and give the utmost respect to their ultimate findings. This respect, conferred upon the trier of fact, further permeates our entire legal system. Indeed, courts of appeal are constrained not to overturn a fact finder's credibility determination, absent finding that it committed a manifest error. For example, in *Darbonne v. Wal-MartStores Inc.*,[26] we summarized the manifest error rule as follows:

> The reviewing court must give great weight to the factual conclusions of the trial court. Manifest error is the standard used by appellate courts to resolve conflicting factual evidence. This means that where a reasonable factual basis exists for those findings, they should not be disturbed by the appellate court in the absence of manifest error . A court of appeal may set aside a trial court's or a jury's finding of fact if it finds that there was manifest error or if the decision was clearly wrong. If the trial court or jury findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even if it is convinced that had it been si tting as the trier of fact, it would have weighed the evidence differently.
>
> For the reviewing court, the issue to be resolved is not whether the trier offact was wrong but whether the factfinder's conclusions were reasonable. Thus, where there is a conflict in the testimony, the trial

> court's reasonable *evaluations of credibility* and reasonable inferences of fact should not be disturbed upon review even if the appellate court may feel that its own evaluations and inferences are as reasonable.

(Emphasis added.)

Obviously, determining "the truth" is sacred ground which we have, traditionally, reserved for the fact finder. Allowing an "an expert" in "lie-detecting" to testify as to whether a witness is telling the truth imports the danger to supplant, rather than assist, the fact finder in its major function. Indeed, permitting this to take place promises that a litigant will use such an

[26] 00-551, pp. 3-4 (La.App. 3 Cir. 11/2/00); 774 So.2d 1022, 1025-26 (citations [: omitted).

"expert," in rebuttal, to verify the credibility of his/her witnesses attacked, as well as to assail the opponent's case by providing "expert" testimony that the opponents' witnesses are "lying."

ADMISSIBILITY OF POLYGRAPH EVIDENCE

From a purely evidentiary standpoint, we find polygraph evidence to be", inadmissible. Essentially, polygraph testimony amounts to credibility determinations, impliedly based on character for truthfulness. Our code of evidence, as do the Federal Rules of Evidence, provides that character evidence is generally inadmissible to show that the person acted accordingly .[27]

Louisiana Code of Evidence Article 404(A)(3) describes an exception to this general rule, concerning a witness ' character, under La. Code Evid. arts. 607, 608 and 609. Article 609, which imparts an exception to attacking credibility by admitting evidence of criminal conviction in civil cases, does not apply to the circumstances *sub judice.* However, Article 607(A) sets forth general rules to attack and support credibility. First, it states that "[t]he credibility of a witness may be attacked by any party, including the party calling him." However, it distinguishes intrinsic and extrinsic evidence when providing guidelines for admissibility.

Intrinsic evidence is generally admissible to attack the credibility of a

witness. Article 607(C) states that "a party ...mayexamine [the witness] concerning any matter having a reasonable tendency to disprove the truthfulness or accuracy of his testimony."

Regarding extrinsic evidence admissibility, Article 607(D) provides:

Except as otherwise provided by legislation:

(1) Extrinsic evidence to show a witness' bias, interest, corruption, or defect of capacity is admissible to attack the credibility of the witness.

(2) Other extrinsic evidence, including prior inconsistent statements and evidence contradicting the witness' testimony, is admissible when offered solely to attack the credibility of a witness unless the court determines that the probative value of the evidence on the issue of credibility is substantially outweighed by the risks of undue consumption of time, confusion of the issues, or unfair prejudice.

[27] La.Code Evid. art. 404.

Article 608 specifies distinctive factual circumstances and modalities to admit extrinsic evidence. For example, La.Code Evid. art. 608(A) provides for the admissibility of"[r]eputation evidence of character"; Article 608(8) for "[p]articular acts, vices or courses of conduct"; and Article 608(C) for "[c]ross-examination of character witnesses." Particularly relevant to the case *sub judice,* La.Code Evid. art. 608(A) states that "[t]he credibility of a witness may be attacked or supported by evidence in the form of general reputation *only[.]"* (Emphasis added.) Further, concerning specific instances of conduct, La.Code Evid. art. 608(8) provides that "[p]articular acts, vices, or courses of conduct of a witness *may not be inquired into or proved by extrinsic evidence for the purpose of attacking his character for truthfulness,* other than conviction of crime as provided in Articles 609 and 609.1 or as constitutionally required." (Emphasis added.)

In the case *sub judice,* the Mayor introduced the polygraph test's results and the polygraph expert's testimony, both extrinsic evidence by definition, to directly attack Patrolman Evans's credibility; namely, to prove that he lied when he said that he did not divulge Mr. Prater's identity as an informant to any unauthorized person; i.e., his son and/or Mr. Pickens. The demarcations, which the polygraph machine made, *per se,* are meaningless. And, essentially, Mr. Trahan' s interpretation of them, I along with his concomitant testimony,

amount to an attack on Patrolman Evans' , credibility, based on particular acts - his responses to Mr. Trahan ' s questions.

Accordingly, we find Mr. Trahan's testimony and the test results to be inadmissible under La.Code Evid. art. 608(A) and (8), as neither, the testimony nor , the results, constitutes "[r]eputation evidence of character." Specifically, Mr. Trahan's opinion, grounded in his interpretation of Patrolman Evans' physiological and verbal responses to his questions, is not an opinion regarding Patrolman Evan's character for truthfulness or untruthfulness based on his *reputation* in the community.

Indeed, even if a link could be established between physiological responses and deceit, ascertaining a person's truthfulness on a specific occasion and in the form of, a few questions is not tantamount to addressing one's *character or reputation* for truthfulness. Indeed, in *United States* v. *Scheffer,* [28] the United States Supreme Court stated that "an expert polygrapher's interpretation of polygraph results. ..is merely

[28] 523 U.S. at317,~18 S.Ct. at 1268,n.13 (1998).

the opinion of a witness with no knowledge about any of the [relevant] facts. .. concerning whether the [witness] spoke truthfully or deceptively on another occasion." Furthermore, assuming that the polygrapher had wished to testify as to Patrolman Evan's character or reputation for truthfulness, rather than give his interpretation of the polygraph results and of Patrolman Evans' specific answers to some of his questions, he would not have been qualified to do so, as he failed to demonstrate a personal knowledge in that regard.

Accordingly, the trial court erred when it upheld the Board's decision to admit the Mr. Trahan's testimony and polygraph results.

Although our determination on this issue appears to be *res nova* in Louisiana, there is support for it in Federal Court's decisions.[29]

DE Novo REVIEW

Having found a legal error in the Board's and trial court's decisions to admit the polygraph results and the polygrapher's testimony into evidence, we conduct a *de novo* review of the record's remaining evidence to determine whether it sufficiently supports the Board's findings and action.

Excluding the polygraph-related evidence, the Mayor's case consists of Patrolman Evans' sworn testimony, denying that he had revealed Mr. Prater's name to anyone who was unauthorized Johnny or Mr. Pickens -contradicted by

an unsworn statement, transcribed from what Mr. Pickens purportedly related to law enforcement.

Patrolman Evans' counsel objected to the statement's admissibility. We are mindful of the fact that Mr. Pickens opted to "take the fifth" at Patrolman Evans' board hearing, as opposed to testifying, thus making him technically unavailable under La. Code Evid. art. 804(A). It is well settled that when a declarant is unavailable under La. Code Evid. art. 804(A), her/his hearsay statement, nevertheless, may be admitted into evidence if it fits within one of the six hearsay exceptions designated under La.Code Evid. art. 804(B).

[29] *Maddox* v. *Cash Loans of HuntsvilleII,* 21 F.Supp.2d 1336 (N.D.Ala. 1998); *see United States* v. *Sanchez-Robles,* 927 F.2d 1070 (9thCir. 1991); *see also, Scheffer,* 523 U.S. 303,118 S.Ct. 1261; *United States* v. *Pitner,* 969 F.Supp 1246 (W.D. Wash.1997).

At first glance, only two of those exceptions could prove applicable to Mr . Pickens' statement. First, La. Code Evid. art. (804)(B)(3) provides an exception to the hearsay rule in the case of a "[s]tatement against interest." However, we do not find this exception applicable, because although Mr. Pickens' statement, as a whole, may have been against his penal interest, to some extent, under *Williamson* v. *United States,*[30] as adopted in Louisiana by *State* v. *Smith,*[31] and *State* v. *Anthony,*[32] the part of his statement involving Patrolman Evans was not self-inculpatory. Thus, it was inadmissible.

Second, La. Code Evid. art. (804)(B)(6), a catchall provision, provides in relevant part, that a hearsay statement may be admissible when "[i]n a civil case, a statement not specifically covered by any of the foregoing exceptions if the court determines that considering all pertinent circumstances in the particular case the statement is trustworthy[.]" We note two crucial contradictions in Mr. Pickens' statement concerning Patrolman Evans having divulged a confidential informant. Mr . Pickens stated that Johnny did not mention names. Instead, "He [Johnny] said some niggers on Bishop told me that Ernie [Prater] was the one ratting us out." Not only does this underscore a critical inconsistency, but it also demonstrates that there could have been another source for his information other than Patrolman Evans.

Additionally, Mr. Pickens discredited himself concerning the circumstances under which Patrolman Evans imparted the information. In one instance, he claimed that upon arriving at their house, he heard Patrolman Evans talking to his son about Mr. Prater's identity. Yet, another time, he said that Johnny was not present when Patrolman Evans gave Mr. Pickens the information.

Accordingly, we find that Mr. Pickens' purported accounts are so inconsistent on core issues regarding Patrolman Evans' alleged violation that they lack total credibility and trustworthiness. Thus, his statement should not have been admitted

[30] 512 U.S. 594, 114 S.Ct. 2431 (1994).

[31] 94-1221,94-1222,94-1223 (La. 10/7/94); 643 So.2d 1221.

[32] 97-91 (La.App. 3 Cir. 6/4/97); 695 So.2d 1142, *writ denied,* 97-1774 (La. 11/26/97); 703 So.2d 645. li

under La.Code Evid. 804(B)(6), and the trial court erred when it denied Patrolman Evans' objection to that effect.

This leaves us with Patrolman Evans' testimony and Chief Malone's conjecture. The gist of Chief Malone's theory dealt with his belief that Patrolman Evans revealed the information in order to protect his son from arrest for drug usage and because Mr. Pickens was a friend. However, Patrolman Evans' history of behavior does not support Chief Malone's theory. Quite the contrary. The record reveals that Patrolman Evans has never tried to shield Johnny or any family member from criminal prosecution and, in fact, has been completely forthright and aggressive by taking immediate potentially punitive action in that regard. For example, he initiated an investigation ofhis son, which could have caused his arrest. Specifically, when he suspected him of drug dealing, he contacted the police and asked them to investigate. He also helped them to search his car and told his fellow officers that "if they had to put him (Johnny) in jail ...they had a job to do. But I did not want him on the street selling drugs." He remarked that he would have assisted them in arresting his son, if needed.

In another incident, he suspected a nephew, who was living with him at the time, of being involved with drugs. He contacted Sergeant Pine, who was

in charge of the DeRidder Police Department, and summoned a drug detecting dog unit to search his house. The search yielded crack cocaine.

Betty Rose Pichon, Deputy Sheriff with the Beauregard Parish Sheriff s Office, fundamentally and unequivocally confirmed Patrolman Evans' testimony regarding both incidents.

If anything, his exemplary behavioral history speaks just the opposite of a man who would do anything to protect his son from a drug arrest.

Based on this record, we conclude that the Board did not possess sufficient "cause" to terminate him. Accordingly, we restore him to his former position with back pay and allowances.

CONCLUSION

The district court erred in affirming the Board's decision to uphold Patrolman Evans' termination. We reverse, holding that the Board abused its discretion in admitting the polygraph examination results and Mr. Trahan ' s testimony. We restore Patrolman Evans to his former position, with back pay and allowances, and cast the City, to the extent allowed by law, with costs, in the amount of $734.25.

REVERSED.

SUPREME COURT OF LOUISIANA

****

NO. 2001-C-2466

****

JOHNNY M. EVANS, SR.
Plaintiff - Respondent

v.

DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD
and THE CITY OF DERIDDER, LOUISIANA
Defendants - Applicant

****

OPPOSITION OF JOHNNY M. EVANS, SR., TO DEFENDANT'S APPLICATION FOR SUPERVISORY WRITS OF REVIEW TO THE COURT OF APPEAL, THIRD CIRCUIT

****

CIVIL CASE

****

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STATEMENT OF THE CASE

The respondent, JOHNNY M. EVANS, SR., has been in law enforcement a majority of his entire life. He served twenty-two (22) years in the United States Army, in which he was in the military police for fourteen (14) years. During this time, he had a top secret clearance rating. Following his military career, Officer Evans was

employed with the Beauregard Parish Sheriff's Office for two (2) years and finally with the DeRidder City Police for four and a half (4 ½) years. Law enforcement was his life.

On or about June or July, 1997, Johnny M. Evans, Sr., contacted Betty Pichon and Saul Wilson of the Narcotics Task Force due to his son's possible involvement in drug activity. Officer Evans advised these officers that his son was beginning to have expensive things and he didn't feel as if he was making that much money at his present job. Officer Evans asked them if they would check him out to see if he was involved with drugs (Tr. p. 38). In another incident, he suspected a nephew, who was living with him, of being involved with drugs. He contacted Sergeant Pine of the DeRidder City Police, and summoned a drug detecting dog unit to search

his house. The search yielded crack cocaine.

Respondent, JOHNNY M. EVANS, SR., was terminated from his employment with the DeRidder City Police Department by letter dated October 29, 1997. The termination became effective October 31, 1997 at 4:00 o'clock p.m. Reasons for his termination were set forth in a letter from Chief of Police, Arvin Malone, dated October 29, 1997 which stated, in pertinent part:

> "1. Patrolman Evans is a friend of Pickens:
> A. There is no logical reason Eric would makeup such a story on a friend.
> 2. Eric made accusations before he was a suspect and again after becoming a suspect.
> 3. It is apparent Eric and Johnny Evans, Jr., knew or Earnest Prater's connection with Law Enforcement as this is the motive established by the Vernon Parish Sheriff's Department for the homicide.
> A. Many times different people are thought to be Confidential Informants For Law Enforcement, sometimes true, but many times not so. Based on "Street Talk", there has been no such retaliation against people Accused of being Confidential Informants as

the suspects are accused of doing. This would indicate that they most likely had a strong confirmation from someone in position to know for certain what Prater's connection was with Law Enforcement, Officer Evans knew of this connection. Granted other Law Enforcement Personnel knew of the connection, but none of them have been accused of leaking the information to the suspects, Officer Evans has been.

Possible Motivation for Ptn. Evans to disclose the identity of Prater:

1. To protect his son from possible arrest.
   A. Knew son was suspected of possible drug activities.
2. To protect Eric Pickens from possible arrest.
   A. Eric is a friend.

Possible Reasons for Ptn. Evans to deny accusation:

1. Accusation may not be true.
2. To protect himself f rom possible criminal charges.
3. To protect himself from possible civil liability.
4. To protect himself from possible administrative sanctions.
5. To maintain his credibility and trust of the public, fellow officers, other law enforcement agencies, and Criminal Justice Entities,

Judges, District Attorney, etc.

The respondent, Johnny Evans, Sr., was ordered to take a polygraph examination under the threat of termination of employment. (see letter from Chief

Arvin Malone dated September 25, 1997 (Tr. Ex. 3). As stated by the examiner,

"The results of the test indicated that Officer Evans wasn't being truthful when he denied disclosing the identity of Earnest Prater to Eric Pickens and Johnny Evans, Jr."

On November 3, 1997, the undersigned counsel filed a request for a hearing before the DeRidder Municipal Fire and Police Civil Service Board (hereinafter referred to as the "Board") challenging the employment termination of Officer Johnny M. Evans, Sr.

A hearing was scheduled for December 18, 1997. On December 18, 1997, a hearing was held to determine if the termination of Officer Johnny M. Evans, Sr., was taken in good faith for cause. The Board found that the evidence was conclusive and affirmed the termination of Officer Johnny M. Evans, Sr. (Tr. pp. 203-205). Johnny Evans, Sr. appealed to the District Court, which affirmed the Board's decision. Johnny Evans, Sr. appealed to the Third Circuit Court of Appeal which reversed the ruling of the District Court.

DEFENDANT'S ASSIGNMENT OF ERROR NO. 1:

The Third Circuit, erred in relying upon United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) and Louisiana Code of Evidence Articles 607 and 608, rather than State v. Catanese, 363 So.2d 975 (La. 1979) and Louisiana Code of Evidence

Articles 701 through 704, thereby resulting in exclusion of polygraph evidence per se in such a civil, administrative proceeding as existed here; rather, the polygraph evidence in this case was properly admitted and supports the District Court's affirming of the dismissal from employment of Johnny M. Evans, Sr.

OPPOSITION TO ASSIGNMENT OF ERROR NO. 1

On December 18, 1997, a hearing was conducted to determine if the termination of Officer Johnny M. Evans, Sr., was taken in good faith for cause. The Board found that the evidence was conclusive and affirmed the termination of Officer Johnny M. Evans, Sr.

The Board relied solely on the results of the polygraph examination of Plaintiff, Johnny M. Evans, Sr., and did not take into consideration any conflicting

evidence which was presented at the hearing by the undersigned counsel. **Little, if any**, evidence was adduced or exists substantiating the assumptions, innuendos and unjustified conclusions asserted in the letter of termination from Chief Arvin Malone, none of which would be sufficient, even if proven, to support the decision of the Board. Ultimately, the Board, through their counsel, David Lestage, **stated that they relied solely on the results of the polygraph test** (Tr. p. 82 lines 18-21):

MR. LESTAGE

"Counsel misses the point. Mr. Evans was ordered to undergo a polygraph, and it's the results of that polygraph for which Mr. Evans was fired."

At the hearing, counsel for the City of DeRidder offered hearsay statements of Eric Pickens, into evidence,

over objection, alleging disclosure of the identity of a confidential informant by Officer Evans. These statements were allowed in evidence. Counsel for Mr. Evans then sought to show the myriad inconsistencies and inaccuracies of these statements. In response, counsel for the City of DeRidder objected, frequently, alleging that these statements were irrelevant .

The City of DeRidder now argues that these same statements constitute substantive evidence sufficient to justify Officer Evans termination.

Respondent has contended through all levels of this proceeding, i.e., Civil Service Hearing, District Court Documentary Review, Third Circuit Court of Appeals, and now to the Honorable Supreme Court of Louisiana, that his termination was without **good faith and cause.**

In order for the decision of the Civil Service Board

to be found to have been made in good faith and for legal cause, there must be **sufficient evidence** to support the administrative decision. City of Abbeville v. Abbeville Fire and Police, 599 So. 2d 508 (La. App. 3 Cir. 1992) writ denied 604 So. 2d 1308.

It is respectfully submitted that **sufficient evidence** is synonymous with "**competent**" evidence. The decision of the Civil Service Board of the City of DeRidder must be based on competent evidence. Incompetent evidence will not be considered on appeal. Ruddock v. Jefferson Parish Fire Civil Service Board, 688 So. 2d 112 (La. App. 5th Cir.).

Further, the issue to be determined by the Board or by the District Court, in the event an appeal is taken to that Court, is whether the decision of the appointing authority or of the Board was "made in good faith for

cause" is construed to mean that the action of the appointing authority, in order to be valid must be **both** "in good faith" and "for cause". The action of the authority must be set aside if it was not taken "for cause" even though it may have been taken in good faith. Martin v. City of St. Martinville, 321 So. 2d 532 (La. App. 3 Cir. 1975) writ denied 325 So. 2d 273.

The burden of proof of the appointing authority in a proceeding challenging termination of a civil service employee is by a preponderance of the evidence. The facts must be clearly established, they need not be established beyond a reasonable doubt as in a criminal case. Ruddock v. Jefferson Parish Fire Civil Service Board, 688 So. 2d 112 (La. App. 5 Cir.)

It is respectfully submitted that conflicting and contradictory hearsay statements do not qualify as

"compentent" evidence. Further, movant contends and the Third Circuit Court of Appeals agreed in their decision, that having found legal error in the Board's and Trial Court's decision to admit the polygraph results and the polygrapher's testimony into evidence, a determination must be made as to whether or not there is sufficient evidence to support the Board's actions. The Third Circuit Court of Appeals stated "Based on this record, we conclude that the Board **did not possess sufficient "cause" to terminate him."**

DEFENDANT'S ASSIGNMENT OF ERROR NO. 2:

The Court of Appeal, Third Circuit, erred in relying upon United States v.

Scheffer 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) and Louisiana Code of Evidence Articles 607 and 608, rather than State v. Catanese, 368 So.2d 975 (La. 1979) and Louisiana Code of Evidence Articles 701 through 704, thereby resulting in exclusion of polygraph evidence per se in such a civil, administrative proceeding as existed here; rather, the polygraph evidence in this case was properly admitted and supports the District Court's affirming the dismissal from employment of Johnny M. Evans, Sr.

OPPOSITION TO ASSIGNMENT OF ERROR NO.2:

> "Nothing in Daubert foreclosed, as a constitutional matter, per se exclusionary rules for certain types of expert or scientific evidence" United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 975 (La. 1975). **[Emphasis Added]**

This same rationale should apply to jurisprudence, as the United States Supreme Court concluded (in

footnote 7):

> "[i]t would be an odd inversion of our heirarchy of laws if altering or interpreting a rule of evidence worked a corresponding change in the meaning of the Constitution" Scheffer, Id.

However, in the event a per se exclusion of such evidence is subordinated to a case by case review, this record is extremely deficient of facts requisite to admissibility. The Third Circuit Court of Appeals obviously observed these inadequacies in the record.

Concerning the qualifications of the test administrator, the record is absent evidence that Mr. Trahan had previously qualified as an expert, or that a substantive portion of his income is derived through polygraphy.

In determining whether the expert is proposing to testify to opinion based on scientific knowledge, the record must include an inquiry into the evidentiary

relevance and reliability of the principles that underline a proposed submission. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993).

Such factors include:

a.) What is the known or potential rate of error? Daubert, @ p. 2797

b.) What standards exist to control the techniques operation? Daubert, @ p. 2797

c.) Can the hypothesis be and has it been tested? Daubert, @ p. 2796

d.) Has the theory or technique been subjected to peer review and publication? Daubert, @ p. 2797

e.) What is the degree of acceptance of the technique within the relevant community? Daubert, @ p. 2797

While the polygraphist in this case submitted an unbelievable rate of error of one (1%) percent, the most

telling disclosure was that this rate of error is not verifiable.

> "Q. Have you ever made a mistake in any of these five or six hundred polygraph examinations you've conducted?
> A. Yes, sir, I have.
> Q. And about how many?
> A. Well, verifiable would be difficult; but I would say the number would be between five and ten." (Tr. p. 136 lines 8-13)

This record is somewhat silent on the existence of standards to control the techniques operation. Likewise, it is respectfully submitted that there are no established procedural safeguards which would safeguard the administration of the polygraph. The machine used on Officer Evans was the Auther VI (Tr. p. 125), which, according to the polygraphist is not in general use.

> "Q. And was the polygraph used for the examination of Mr. Evans an instrument in general use?
>
> A. Well, it's not an instrument in

> general use, because Dick Arther has polygraphs made to his specific - - to his specifications, as opposed to nowadays you can get them that's computerized and people go with computer. You can get polygraphs that are electronically enhanced. The Arther VI that I use is not electronically enhanced. In other words, the recording is an actual recording from the person; it is not enhanced to get a better reading off of it." (Trans. p. 124 lines 21-25 and p. 125 lines 1-5)

The most notable disclosure by this polygraphist was a total lack of Knowledge as to how his machine (Arther VI) functioned.

> "Q. You're not an engineer of any kind?
>
> A. No, sir, I'm not.
>
> Q. Electric engineer or anything of that sort?
>
> A. No, sir.
>
> Q. And you didn't build this

polygraph?

A. No, sir, I did not.

Q. And you don't know, from an engineering standpoint, what makes that part of it work?

A. I am not an electronic engineer; I don't know what makes it work" (Tr. p. 129 lines 10-19).

Yet, notwithstanding this total lack of knowledge of the inner functions of the Arther VI, this polygraphist performs his own repairs when his machine malfunctions or breaks.

"Q. You indicated, in response to Mr. Lestage's questions, you're not an engineer. You don't know how that machine works, it's inner - - I mean, you don't know its inner functioning. You couldn't take it apart and put it back together.

> A. Well, I don't say I couldn't do that, because I do my own repairs. But as far as taking - - looking at the little transformer and know why that transformer does all this, no. But if there's something wrong with my polygraph, I generally fix it myself. If that transformer needs changing, I'll order a new one and change it. But as far as what makes the transformer, you know, affect the components inside, no" (Tr. p. 161 lines 18-26, p. 162 lines 1-3).

The paradigm in the State of Louisiana is the use of the Intoxilyzer 5000 for determination of intoxication. It can be presumed that few, if any, officers administering the Intoxilyzer 5000 know the inner functions of this machine or how to repair it, although they are certified to administer the test. Consistent with its widespread use, the State established extensive safeguards, through the

Louisiana Registry, (Title 55 Public Safety), for the use, maintenance, calibration and admissibility of test results. The machine must be calibrated with a known sample within four (4) months of administration of a test to be used in evidence at trial, Louisiana Registry, (Title 55 Public Safety Chap. 5 Section 501) and a certificate issued and filed in the records of the Clerk of Court in the judicial district in which the test is administered. Each inspector must be periodically re-certified, Louisiana Registry, (Title 55 Public Safety Chap. 5 Section 507). These safeguards apply to detection of blood alcohol content, a much more exacting science than determining the veracity of statements made by a test subject.

Yet, this record is silent on the existence of any such rules or regulations for the Arther VI.

This polygraphist disclosed other factors

suggestive of the abstract, inexact and subjective nature of polygraphy.

1. "Q. We'll get to that in a minute. One other thing I want to touch on that you just gave in your explanation. So now you're telling me that during this test or to arrive at your conclusions, you relied on body language and demeanor of Johnny Evans.

   A. Well, it has - - It has some - - It has some play in it; but the bottom line is the chart - - is the chart analysis." (Tr. p. 167 lines 15-21)

2. "Q. And further, you stated, and I'll quote, "A positive truthful person would possibly have answered.., "quote, " I will pass because I know I did not do this thing," unquote, "etcetera." So what I'm getting to is, obviously, "should do good" is not a positive response in that, Mr. Trahan?

   A. Well, no, it's not a positive response. You know, I'm going to pass this," is going to be a positive response." (Tr. p. 172 lines 2-6)

3. " . . . He swallowed at that particular point. That's a sign of relief from a person that was stressed by the particular question

- -" (Tr. p. 157 lines 7 - 9)

4. " . . . the liar will tend to rate the olygraph on the low end of the scale. A truthful person would tend to rate it on a higher end of the scale . . . " (Tr. p. 131 lines 22-24)

5. " . . .when a questions places him under stress and they are thinking about their heart rate increasing and everything, they're going to change their Breathing; and it's going to have a direct - - reflect directly down on the heart - - " (Tr. p. 149 lines 13-17) **(Emphasis Added)**

6. " . . .Mr. Evans, in my opinion did not tell the entire truth on this particular issue" (Tr. p. 146 lines 1-12) **(Emphasis Added)**

7. "Q . . . I want to revisit one question. Can you distinguish between partial truths and lies on your test?"

A. No, absolutely no." (Tr. p. 164 lines 21-23)

8. "Q. He interpreted the question to mean that you were indicating he was telling you lies on all questions up to that point."

A. No; he didn't give me any indication of that. He didn't - - - Normally, when a

> person feels that way, they'll look at me and say: What, you're calling me a liar? And then I have to explain to them: No, no, no; I'm not calling you a liar; what I'm trying to do is to get theses areas in your past out of they way so there's no - - - something don't show up on the chart that could be misinterpreted as that question." (Tr. p. 179 lines 2-4)

As stated by the Honorable Third Circuit Court of Appeals:

> "While the machine appears to produce straightforward and reliable physiological measurements, the examiner's method of questioning, as well as his or her interpretation of the results, may not. Therein lies an acute danger. "[T]he individual skill and training of examiners . . . affects the reliability of a polygraph. Clearly, 'bells do not go off' at the moment someone tells a lie. Rather, the polygraph's ability to discern the truth rests in the skill of examiners. 'Although an adequate instrument is essential for proper testing, the role of the examiner in interviewing the examinee, designing test questions, and evaluating and interpreting the polygram is much more critical to an accurate diagnosis than is the mechanical function of the polygraph itself.'

Thus, the skill of examiners fundamentally affects the ultimate reliability of the test.

However, one of the main reasons which bolsters polygraphs' prohibition in legal proceedings involves, not only the issue concerning its reliability but, also, its probative value or relevancy. Apparently, **there is no scientifically proven cause and effect connection between an increase in the pertinent physiological reactions and "truth telling."** Indeed, some authors noted that "[t]he heart of the present critique of the polygraph is that **no theory that ties deception (or any criminal activity) with physiological reactions has been formulated.** Furthermore, there is 'no known physiological response that is unique to deception,' and all physiological measures used for polygraph tests are sensitive to, and can be elicited by, a host of factors other than deception or criminal activity. If deception is not uniquely related to physiological reactions, and theory cannot explain the nature of the relationship, it is impossible to predict the conditions under which polygraph test results will be accurate or inaccurate" (Yvonne Koontz Sening, Heads or Tails: The Employee Polygraph Protection Act, 39 CATH.U.L. REV. 235, 264 (1989)

This record answers the remaining Daubert, Id. r

requisites in much the same manner. "There is simply no

consensus that polygraph evidence is reliable". United States v.Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed. 2d 975 (La. 1975)

The opinion of the polygraphist is also subject to the balancing test set forth in Louisiana Code of Evidence Article 403.

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."

Officer Evans was terminated from his employment solely as a result of the polygraph results.

MR. LESTAGE:

> ". . . Counsel misses the point. Mr. Evans was o ordered to undergo a polygraph, and it's the results of that polygraph for which Mr. Evans was fired." (Tr. p. 82 lines 19-21)

MR. LESTAGE:

> ". . . I object to that. He asked - - He ordered the man, Mr. Evans, Sr., to undergo a polygraph examination to help in that determination. If the man had passed, he'd still be on force and on salary. I mean, it's that simple." (Tr. p. 115 lines 1-6)

It is not a difficult transition to consider the test result having identical conclusive effect with the members comprising the Civil Service Board at Officer Evans' hearing.

DEFENDANT'S ASSIGNMENTS OF ERROR 3,4&5

3: The Court of Appeal, Third Circuit, erred in finding that only one statement of Eric Pickens incriminating Johnny M. Evans, Sr., was admitted at the Civil Service Hearing and that accounts therein were so inconsistent as to evidence lack of credibility and trustworthiness on the part of Eric Pickens so as to justify

reversal of the termination of employment of Johnny M. Evans, Sr.

4: The Court of Appeal, Third Circuit, erred in determining that the Boards admission fo the two statements of Eric Pickens implicating Johnny M. Evans, Sr., was not justified pursuant to Louisiana Code of Evidence Article 804, paragraph B(3) or (6), or alternatively Article 101. As well as administrative Rule 10.4 of the said Board.

5: The Court of Appeal, Third Circuit, erred in failing to remand this matter to the District Court with instructions that it remand same to the Board to reopen the evidence so that the City of DeRidder can present testimony of Eric Pickens since his conviction of manslaughter in the death of Earnest Prater, Jr., is final and he can no longer refrain from testifying by relying

upon the privilege against self-incrimination afforded by the Fifth Amendment of the United States Constitution and/or La. Constitution Article 1 Section 16.

OPPOSITION TO ASSIGNMENT OF ERROR NO. 3, 4 & 5:

The hearsay statements of Eric Pickens contain a plethora of inconsistencies. These inconsistencies were, in part, disclosed during Officer Evans' termination hearing (although strenuously objected to by counsel for the City of DeRidder as being irrelevant). Simply put they are the statements of an individual who participated in a murder, made to feign cooperation with law enforcement, cast another party with involvement, and possible revenge for Officer Evans arresting him on August 14 (Tr. p. 87, lines 13-17). As noted by the Honorable Third Circuit Court of Appeals, the statements

contain, at a minimum, two (2) crucial contradictions. Many others, however, exist.

In the statement given on August 28, 1997, Mr. Pickens made no mention of being a participant in the murder of Ernest Prater. Additionally, he stated that Johnny Evans, Jr., was not present when this disclosure was made.

Next, in his statement given on August 31, 1997, Mr. Pickens disclosed that the information came from Johnny Evans, Jr.:

> "Q. Okay, who told uh, who told that Ernest was ratting people out or . . . ?
>
> A. Johnny.
>
> Q. How did he know?
>
> A. He said those dudes on Bishop told him.
>
> Q. On Bishop?

A. He didn't say no names. He said some niggers on Bishop told me that Ernie was the one ratting us out.

Q. He never told you nobody else at any time, had he . . he had learnt . . that Ernest, that was the first that you knew Ernest was ratting?

A. Yeah, then I went over there and him and his daddy was talking about it."

The pronoun "him" used in this last statement can only refer to Johnny Evans, Jr., who was the individual being discussed in pp. 1-8 of that statement. Thus, Johnny Evans, Jr., revealed that this information came from "those dudes on Bishop" street. Further, this statement was made at a location other than the home of Johnny Evans, Sr., as Mr. Pickens indicated, "Yeah, then I went over there . . . "

In the questioning of Police Chief Arvin Malone, it was revealed that Eric Pickens had made an undercover

purchase of drugs from J.J. Johnson.

MR. LESTAGE:

"Again, Mr. Chairman, I'm going to have to object. Whether any of us know J.J. Johnson is beside the point. It's just not relevant.

CHAIRMAN WILLIAMS:

Sustained.

MR. JONES

I can't get into this other lie to show this last inconsistency, Mr. Chairman?

CHAIRMAN WILLIAMS

No, sir.

MR. JONES

Well, I'd ask to proffer it in, then. And I need to ask Chief Malone a questions in order to complete my proffer.

CHAIRMAN WILLIAMS:

Okay.

Q. (Mr. Jones) Chief Malone, were you aware

that on August 16, 1997, Eric Pickens did an undercover buy from J.J. Johnson of drugs?

A. I was aware there was some involvement there. I don't know all of the details on it, but I was aware that there was some transaction there somehow.

MR. JONES:

That completes my proffer on that question, Mr. Chairman".(Tr. p. 107 lines 1-25 and p. 108 l 1)

Yet, in his statement of August 31, 1997, Mr. Pickens indicated a lack of knowledge of J.J. Johnson.

"Q. Just you there. And he told you that , he had turned you and several more . . . J.J., who is he referring to as J.J.?

A. It's a dude named J.J. I don't know him, though."

Accordingly, it is respectfully submitted that the Honorable Third Circuit Court of Appeals correctly found these statement to lack credibility and trustworthiness.

Louisiana Code of Evidence Article 804 (B) 3 provides an exception to the hearsay rule for statements against interest. Mr. Pickens' statement on August 28, 1997 to Officer Johnson, Pine and Gott did not subject him to criminal liability. It is not a statement against his interest. At no time during that statement did he profess to be a participant in or have distinct knowledge of the murder of Ernest Prater. Additionally, its inconsistency with the later statement given on August 31, 1997 gravitates toward inadmissibility under the hearsay exception provided by Article 804 (B)6.

As to the admissibility of the statement given on August 31, 1997, the United States Supreme Court, in Williamson v. United States, 512 U.S. 594, 114 S. Ct. 2431 (1994), held that the term "statement" in Federal Rule 804(B)(3), does not refer to an extended declaration

such as a report or narrative in its entirety. Louisiana Code of Evidence Rule 804(B)(3) is identical to the federal counterpart.

> "The fact that a person is making a broadly self-inculpatory statement does not make more credible the confessions non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth . . . " Williamson, Id. 2 p. 2435.

The Williamson, Id. majority held that the Rule did not authorize admission of non-self-inculpatory statements made during the course of another's confession. This Honorable Court adopted the Williamson rationale in State v. Smith, 643 So. 2d. 1221 (La. 1994) Subsequently, this interpretation was followed in State v. Coates, 661 So. 2d 571 (La. App. 2nd Cir. 1995), wherein the declarant implicated himself in the crime but attempted to place the ultimate blame on the

defendant.

Finally, the City of DeRidder urges the remand of this matter for rehearing due to the conclusion of criminal proceedings against its previously "unavailable" witness. In urging the admissibility of these statements under Article 804(B)(3) the City of DeRidder should concede that the portions pertinent to this proceeding were not "self-inculpatory". The Fifth Amendment, asserted by Pickens at the Civil Service hearing, does not protect against non-inculpatory statements or disclosures. The City of DeRidder had the right and/or obligation to request that the Chairman direct the witness to answer the questions relevant to that hearing, notwithstanding the witnesses urgence of the Fifth Amendment privilege against self incrimination. They chose not to do so. Nor would live testimony by Mr. Pickens negate the existence

of inconsistencies and contradictions which rendered his hearsay statement untrustworthy. As counsel for the City of DeRidder astutely pointed out during this hearing,

> ". . .We're not here about Eric Pickens and whether he told the right version the first time, the second time, the third time, or whether he can reconcile all three versions. He might be able to reconcile why all three are true. But that's not for us, and its not - - certainly not for Chief Malone to decide now, nor to have decided on October 29. And we'd object to this line of questioning." (Tr. p. 105 lines 17-25, p. 106 lines 1-2)

CONCLUSION

Officer Johnny Evans, Sr., was a member of the United States Army for twenty-two (22) years and was honorably discharged at the rank of E-7, Sergeant First Class. He was classified with a top secret clearance rating for the last eighteen (18) of those years (Tr. p. 48, lines 13-14). After two (2) years with the Beauregard Parish Sheriff's Office, he joined the force of the DeRidder City

Police on April 5, 1993. While with the DeRidder City Police he reported his own family members to the Beauregard Parish Narcotics Task Force for possible drug involvement. His exemplary record itself contradicts the allegations made against him. It is respectfully and humbly requested that this Court deny the requested Writs applied for by the City of DeRidder.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Memorandum in Support of Plaintiff's Appeal has this day been forwarded to David R. Lestage, Attorney for the Defendants.

/s/ Charles A. "Sam" Jones, III
CHARLES A. "SAM" JONES, III